No. 18-966

IN THE

# Supreme Court of the United States

Department of Commerce, et al.,

*Petitioners,*

v.

State of New York, et al.,

*Respondents.*

On Writ of Certiorari before Judgment to the United States Court of Appeals for the Second Circuit

## BRIEF OF AMICUS CURIAE NATURAL RESOURCES DEFENSE COUNCIL IN SUPPORT OF RESPONDENTS


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## INTERESTS OF AMICUS CURIAE

Natural Resources Defense Council, Inc. (NRDC), submits this brief as amicus curiae to address the record-review issues in the instant case. NRDC is a nonprofit advocacy organization that works to protect public health and the environment. Since its founding in 1970, NRDC has litigated hundreds of cases under the Administrative Procedure Act (APA). It has done so both as a plaintiff, challenging agency actions, and as an intervenor or amicus, defending such actions. Based on this extensive litigation experience, NRDC has a strong interest in—and is well suited to speak to—the record-review issues in this case. NRDC recently participated as amicus in another case before this Court that concerned related issues. *See* Brief of Amici Curiae NRDC et al., *In re United States*, 138 S. Ct. 443 (2017) (No. 17-801). As in that case, NRDC submits this brief to explain why judicial review of agency action requires that parties and courts have access to evidence that fully, fairly, and accurately reflects the agency's decisionmaking process.[1]

## SUMMARY OF THE ARGUMENT

This Court initially granted certiorari in this case to review the district court's decision to allow limited discovery beyond the administrative record based on a strong showing of bad faith or improper behavior. *See In re Dep't of Commerce*, No. 18-557. That discovery dispute ultimately turned out to be "not quite as central as it once seemed," however, both because the

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[1] This brief was not authored in whole or part by counsel for a party. No one other than NRDC made a monetary contribution to its preparation or submission. All parties have consented to its filing.

district court "resolve[d] Plaintiffs' APA claims without relying on extra-record evidence," and because "Defendants ultimately stipulated that a wide swath of previously contested documentary material is properly part of the Administrative Record." *New York v. U.S. Dep't of Commerce*, 351 F. Supp. 3d 502, 630 (S.D.N.Y. 2019). In other words, the district court concluded that Defendants "violated the APA in multiple independent ways," and it reached those conclusions "based exclusively" on what Defendants now concede is the proper record. *Id.* at 516.

Accordingly, this Court can (and should) affirm the district court's judgment without reaching the relatively narrow record-review issues on which the parties disagree. Any one of the "classic, clear-cut APA violations" identified by the district court, *id.*, provides sufficient grounds for affirmance, irrespective of whether any discovery or consideration of extra-record evidence was appropriate. Defendants, however, continue to dispute the district court's discovery orders, U.S. Br. 55, and they also contest the court's consideration of extra-record evidence to support one of its alternative holdings, *id.* at 38. NRDC therefore submits this brief as amicus to assist the Court should it consider these issues.

As a general rule, judicial review of agency action under the APA is based on the administrative record that was before the agency at the time of its challenged action. This "record rule" seeks both to prevent courts from substituting their judgment for that of the agencies, and to help courts carry out their important role in ensuring that agencies have engaged in reasoned decisionmaking.

Consistent with these purposes, however, the record rule does not strictly limit all judicial review in APA cases to the record submitted by an agency. Rather, as the parties in this case agree, courts may regularly consider evidence outside of the record when resolving issues that do not concern the merits of an agency action—such as the courts' own jurisdiction, or factors that may warrant equitable relief. *Infra* § I. Defendants therefore concede that this Court should consider evidence and expert testimony introduced by Plaintiffs to establish their Article III standing.

In addition, where the record submitted by an agency omits materials that were before the agency at the time of its decision—as Defendants now admit their initial submission did here—the court may order the agency to complete the administrative record by adding those materials. *Infra* § II. The APA requires that a reviewing court have access to the "whole record." 5 U.S.C. § 706. That requirement is vital to ensuring effective judicial review: A court cannot assess whether a decision runs counter to the evidence before the agency, for example, without having all the evidence before the agency.

As distinct from an order to *complete* the record, it is also sometimes appropriate for a court to allow the parties to *supplement* the administrative record with evidence that was not before the agency at the time of its decision. These narrow exceptions to the record rule apply where extra-record evidence is necessary to enable effective judicial review.

The district court here invoked widely recognized exceptions and found that supplemental extra-record evidence was appropriate both (1) to explain complex issues and determine whether the agency considered

relevant factors, *infra* § III.A, and (2) because Plaintiffs made a strong showing of agency bad faith or improper behavior, *infra* § III.B. Defendants never explain why the first category of supplemental evidence was inappropriate in this case. And their argument regarding the latter exception conflates the standards for ultimately proving unlawful conduct with the lesser showing required to justify discovery or consideration of extra-record evidence. Where, as here, evidence indicates that an agency tried to conceal important aspects of its decisionmaking, effective judicial review may require supplemental evidence or discovery to determine whether the agency is concealing something unlawful.

## ARGUMENT

Judicial review of agency action under the APA is generally based on the administrative record that was before the agency at the time of its challenged action. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971). The rationale behind this "record rule," as it is sometimes described, is twofold.

On the one hand, confining judicial review to the administrative record seeks to prevent a court from itself weighing new evidence and "substitut[ing] its judgment for that of the agency." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). "The reviewing court is not generally empowered to conduct a *de novo* inquiry into the matter being reviewed and to reach its own conclusions based on such an inquiry." *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985). Allowing courts to engage in such inquiry, unconstrained by the administrative record, could "intrude upon the domain which Congress has . . . entrusted to an administrative

agency." *SEC v. Chenery Corp.*, 318 U.S. 80, 88 (1943). "Were courts cavalierly to supplement the record, they [might] be tempted to second-guess agency decisions in the belief that they were better informed than the administrators empowered by Congress." *Deukmejian v. NRC*, 751 F.2d 1287, 1325 (D.C. Cir. 1984), *aff'd sub nom*, 789 F.2d 26 (D.C. Cir. 1986) (en banc).

At the same time, "courts retain a role, and an important one, in ensuring that agencies have engaged in reasoned decisionmaking." *Judulang v. Holder*, 565 U.S. 42, 53 (2011). It is a "foundational principle of administrative law that a court may uphold agency action only on the grounds that the agency invoked when it took the action." *Michigan v. EPA*, 135 S. Ct. 2699, 2710 (2015) (citing *Chenery*, 318 U.S. at 87). And the APA requires not only that an agency's action be "within the scope of its lawful authority," but also that "the process by which it reaches that result . . . be logical and rational." *Id.* at 2706 (quoting *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 374 (1998)).

Courts therefore cannot "satisfy[] themselves that the agency has made a reasoned decision" without "carefully reviewing the record." *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 378 (1989). Because APA review "focuses on the rationality of an agency's decisionmaking process," and not just the "rationality of the actual decision," *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1575 (10th Cir. 1994), a court must assess whether the agency "engaged in reasoned decisionmaking" by determining whether "its decision is adequately explained and supported by the record," *Clark Cty. v. FAA*, 522 F.3d 437, 441 (D.C. Cir. 2008) (Kavanaugh, J.) (quotation omitted). Thus, "to review

an agency's action fairly," a court generally "should have before it neither more nor less information than did the agency when it made its decision." *Walter O. Boswell Mem'l Hosp. v. Heckler*, 749 F.2d 788, 792 (D.C. Cir. 1984).

## I. Some issues in APA litigation are not based on the administrative record.

As described above, the record rule applies to judicial review of the merits of an agency action—for example, whether the challenged action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). "In applying *that standard*, the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." *Camp v. Pitts*, 411 U.S. 138, 142 (1973) (emphasis added). In other words, the court is to "apply the appropriate APA standard of review" to the challenged agency decision "based on the record." *Fla. Power & Light*, 470 U.S. at 743-44.

The record rule therefore does not apply to other, ancillary issues in APA litigation that do not concern the merits of an agency action. Instead, such issues are appropriately resolved based on facts and evidence outside of the administrative record.

A. For example, as all parties in this case agree, threshold jurisdictional issues like Article III standing are not limited to the administrative record. Rather, such issues are often resolved in record-review litigation based on supplemental "affidavit[s] or other evidence." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992); *see Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 153-54 (2010) (relying on declarations to find that plaintiffs had Article III standing). Such extra-

record evidence does not implicate the record rule because courts consider it "not in order to supplement the administrative record on the merits, but rather to determine [their own] jurisdiction." *Nw. Envtl. Def. Ctr. v. Bonneville Power Admin.*, 117 F.3d 1520, 1528 (9th Cir. 1997); *see Sierra Club v. Yeutter*, 911 F.2d 1405, 1421 (10th Cir. 1990).[2]

Moreover, given the nature of Article III jurisdiction and agency proceedings, it would make little sense to limit such issues to the administrative record. "Article III's standing requirement does not apply to agency proceedings"; thus, a potential plaintiff has "no reason to include facts sufficient to establish standing as a part of the administrative record." *Nw. Envtl. Def. Ctr.*, 117 F.3d at 1527-28. Only if that plaintiff "later seeks judicial review, [does] the constitutional requirement that it have standing kick[] in." *Sierra Club v. EPA*, 292 F.3d 895, 899 (D.C. Cir. 2002). Then, as the litigation proceeds, the plaintiff must "supplement the record to the extent necessary to explain and substantiate its entitlement to judicial review." *Id.* at 899-900.

In the instant case, Defendants properly conceded that the district court "[could], and indeed should, look at evidence beyond the Administrative Record" when deciding whether Plaintiffs have Article III standing. *New York*, 351 F. Supp. 3d at 573 & n.30 (citing Trial

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[2] The same is true for mootness and ripeness. In fact, "[b]y definition, mootness concerns events occurring *after* the alleged violation." *S. Utah Wilderness All. v. Smith*, 110 F.3d 724, 729 (10th Cir. 1997). Thus, the court's jurisdiction may necessarily turn on evidence that post-dates the administrative record. *Am. Littoral Soc'y v. EPA*, 199 F. Supp. 2d 217, 228 (D.N.J. 2002); *e.g.*, *Munsell v. Dep't of Agric.*, 509 F.3d 572, 582-83 (D.C. Cir. 2007).

Tr. 1421-22, 1502). Thus, this Court, too, should consider such evidence in reviewing whether a citizenship question would likely drive down response rates and lead to inaccurate census data that would injure Plaintiffs in multiple ways. *Id.* at 619-23; *see Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 330-31 (1999) (relying on expert affidavits to find Article III standing in census case).

B. Questions about remedy—and, in particular, equitable relief—also may turn on facts outside the administrative record. As with standing, "injunctive relief is generally not raised in the administrative proceedings below and, consequently, there usually will be no administrative record developed on these issues." *Eco Tour Adventures, Inc. v. Zinke*, 249 F. Supp. 3d 360, 370 n.7 (D.D.C. 2017) (quotation omitted). "Thus, it will often be necessary for a court to take new evidence to fully evaluate claims of irreparable harm and claims that the issuance of the injunction is in the public interest." *Id.* (quotation omitted).[3]

In APA litigation, then, courts can (and do) consider extra-record evidence when deciding whether parties have made the "requisite evidentiary showing" for equitable relief. *Monsanto*, 561 U.S. at 163; *see id.*

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[3] For preliminary injunctions or temporary restraining orders, courts may also find it necessary, as a practical matter, to rule on the plaintiff's likelihood of success on the merits before the agency submits an administrative record. *E.g.*, *North Dakota v. EPA*, 127 F. Supp. 3d 1047, 1054-55 (D.N.D. 2015). Otherwise, an agency defendant could unilaterally "block requests for preliminary injunctive relief [simply] by delaying production of the administrative record." *Am. Rivers v. U.S. Army Corps of Eng'rs*, 271 F. Supp. 2d 230, 247 & n.11 (D.D.C. 2003).

at 160 (discussing "considerable evidence" and "voluminous documentary submissions" from parties); *Winter v. NRDC*, 555 U.S. 7, 24-25 (2008) (relying on declarations from agency defendants to vacate preliminary injunction). As with standing, evidence "submitted for this purpose do[es] not . . . fall within the ambit of rules governing review of agency decisions under the APA." *Earth Island Inst. v. Evans*, 256 F. Supp. 2d 1064, 1078 n.16 (N.D. Cal. 2003).

C. Courts likewise have held that the record rule does not apply to claims seeking to "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1). This is because "when a court considers a claim that an agency has *failed* to act," there is "no final agency action that closes the administrative record or explains the agency's [in]action[]." *San Francisco BayKeeper v. Whitman*, 297 F.3d 877, 886 (9th Cir. 2002). "Said another way, if an agency fails to act, there is no 'administrative record' for a federal court to review." *Nat'l Law Ctr. on Homelessness & Poverty v. U.S. Dep't of Veterans Affairs*, 842 F. Supp. 2d 127, 130 (D.D.C. 2012). And "if the agency never takes action," the "benefits of agency expertise and creation of a record"—considerations which underpin the record rule—"will not be realized." *Telecomms. Research & Action Ctr. v. FCC*, 750 F.2d 70, 79 (D.C. Cir. 1984).

Moreover, as with questions of standing and equitable relief, claims of unreasonable delay often turn on "particular facts and circumstances"—such as "the nature and extent of the interests prejudiced by the delay," *Mashpee Wampanoag Tribal Council, Inc. v. Norton*, 336 F.3d 1094, 1100 (D.C. Cir. 2003)—that would not appear in an administrative record, even if

one did exist. Thus, judicial review of such claims "may require evaluation of extra-record materials." *W. Rangeland Conservation Ass'n v. Zinke*, 265 F. Supp. 3d 1267, 1272 n.4 (D. Utah 2017).[4]

## II. Completing the administrative record is different from supplementing the record.

In considering the record rule, it is also important to distinguish—as the district court and parties did in this case—between *completing* the administrative record with evidence that was before the agency at the time of its decision, on the one hand, and *supplementing* the administrative record with evidence outside of or beyond that record, on the other. Only the latter scenario is properly considered an "exception" to the record rule. *Fort Sill Apache Tribe v. Nat'l Indian Gaming Comm'n*, 345 F. Supp. 3d 1, 9 (D.D.C. 2018). The first scenario is an application or "explication" of the rule, *United States v. Gonzales & Gonzales Bonds & Ins. Agency, Inc.*, 728 F. Supp. 2d 1077, 1094 (N.D. Cal. 2010), designed to carry out the APA's requirement that the reviewing court have access to "the whole record," 5 U.S.C. § 706.

Admittedly, some "confusion has arisen because the term 'supplement' has been used synonymously to refer to both" scenarios. *Oceana, Inc. v. Ross*, 290 F. Supp. 3d 73, 78 (D.D.C. 2018) (quotation omitted). As the district court here observed, "courts are not

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[4] In addition, because agency delay may be premised on *post hoc* justifications that "need to be explored by plaintiffs," some courts have recognized that "there may well be reason for discovery" to resolve such claims. *W. Watersheds Project v. Pool*, 942 F. Supp. 2d 93, 101 (D.D.C. 2013); *see Tummino v. Von Eschenbach*, 427 F. Supp. 2d 212, 231 (E.D.N.Y. 2006).

always careful to distinguish" between "'completing'" and "'supplementing' the administrative record," such as by "authorizing 'extra-record' discovery." *New York*, 351 F. Supp. 3d at 633 n.55. "Properly understood, however, an order directing *completion* of an administrative record is not the same thing as ordering 'discovery' of material *beyond* the record." *Id.* at 633; *see Water Supply & Storage Co. v. U.S. Dep't of Agric.*, 910 F. Supp. 2d 1261, 1265 n.4 (D. Colo. 2012). "Instead, it is an order that the agency provide the *real*—or 'whole'—record for the court's consideration." *New York*, 351 F. Supp. 3d at 633; *see, e.g., In re United States*, 138 S. Ct. 443 (2017) (considering district court order to "complete" the administrative record).

A. Ensuring that courts have access to the "whole record," 5 U.S.C. § 706, is vital to ensuring effective judicial review. In determining whether an agency action is arbitrary or capricious, for example, a court must evaluate the evidence and analysis before the agency, the considerations the agency weighed, and the agency's conclusions and reasoning. *Motor Vehicle Mfrs.*, 463 U.S. at 43. To carry out this task, the court "must have before it the 'whole record' on which the agency acted." *Bar MK Ranches v. Yuetter*, 994 F.2d 735, 739 (10th Cir. 1993). A court cannot assess whether a decision "runs counter to the evidence before the agency," *Motor Vehicle Mfrs.*, 463 U.S. at 43, without having *all* the evidence before the agency.

Thus, judicial review must be based on the "*full* administrative record" that was before the agency at the time of its decision. *Overton Park*, 401 U.S. at 420 (emphasis added). Anything less could prevent the court from fulfilling its "obligation" to review the

agency action for "arbitrariness or inconsistency with delegated authority." *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 54 (D.C. Cir. 1977). Review of an incomplete record would be "tantamount to abdicating the judiciary's responsibility under the Administrative Procedure Act." *NRDC v. Daley*, 209 F.3d 747, 755 (D.C. Cir. 2000) (quotation omitted). "If the record is not complete, then the requirement that the agency decision be supported by 'the record' becomes almost meaningless." *Portland Audubon Soc'y v. Endangered Species Comm.*, 984 F.2d 1534, 1548 (9th Cir. 1993).

The "whole record" under the APA consists of "all materials that were before the agency when it made the challenged decision." *Sherwood v. Tenn. Valley Auth.*, 842 F.3d 400, 407 (6th Cir. 2016). This means "all documents and materials directly or indirectly considered by the agency," *Bar MK Ranches*, 994 F.2d at 739, including "evidence contrary to the agency's position," *Thompson v. U.S. Dep't of Labor*, 885 F.2d 551, 555 (9th Cir. 1989) (quoting *Exxon Corp. v. Dep't of Energy*, 91 F.R.D. 26, 33 (N.D. Tex. 1981) (Higginbotham, J.)). In other words, "to be complete, the record must include all materials that might have influenced the agency's decision, and not merely those on which the agency relied." *Fort Sill*, 345 F. Supp. 3d at 6 (quotation omitted); *see Ad Hoc Metals Coal. v. Whitman*, 227 F. Supp. 2d 134, 139-40 (D.D.C. 2002).

In most cases, the initial record that the agency submits to the court will suffice. Sometimes, however, that initial submission is incomplete—it may omit materials that were before the agency at the time of its decision. *Cf.* Fed. R. App. P. 16(b) (court of appeals may direct agency to "supply any omission from the record"); 28 U.S.C. § 2112(b) (same). Thus, the "whole

administrative record" under the APA "is not necessarily those documents that the *agency* has compiled and submitted." *Thompson*, 885 F.2d at 555 (quotation omitted). Rather, an agency "may not unilaterally determine" what constitutes the record for judicial review. *Bar MK Ranches*, 994 F.2d at 739.

The reasons for this are obvious. "To review less than the full administrative record might allow a party to withhold evidence unfavorable to its case." *Walter O. Boswell Mem'l Hosp.*, 749 F.2d at 792. The APA does not allow an agency to "skew the record in its favor by excluding pertinent but unfavorable information." *Fund for Animals v. Williams*, 391 F. Supp. 2d 191, 197 (D.D.C. 2005); *see* S. Rep. 79-752 at 214 (1945) ("The requirement of review upon 'the whole record' means that courts may not look only to the case presented by one party, since other evidence may weaken or even indisputably destroy that case."). "Even the possibility that there is ... one administrative record for the public and th[e] court and another for the [agency] and those 'in the know' is intolerable." *Home Box Office*, 567 F.2d at 54.

Thus, as the district court here properly recognized, "where it appears that the administrative record designated by the agency is *not* the 'whole record' that was before the agency decisionmakers at the time of decision, a court may order that the record be *completed*." *New York*, 351 F. Supp. 3d at 632; *see, e.g.*, *Portland Audubon Soc'y*, 984 F.2d at 1548; *Dopico*

*v. Goldschmidt*, 687 F.2d 644, 654 (2d Cir. 1982); *NRDC v. Train*, 519 F.2d 287, 292 (D.C. Cir. 1975).[5]

B. To be sure, an agency's "designation of the Administrative Record, like any established administrative procedure, is entitled to a presumption of administrative regularity." *Bar MK Ranches*, 994 F.2d at 740. But the presumption is *only* a presumption—as such, it may be "rebutted by appropriate evidence." *Erica P. John Fund, Inc. v. Halliburton Co.*, 563 U.S. 804, 811 (2011).

The distinction between completing and supplementing the record is important in this regard "because the two implicate very different burdens." *Fort Sill*, 345 F. Supp. 3d at 9; *see Water Supply & Storage Co.*, 910 F. Supp. 2d at 1265 n.4. "A motion to supplement—to look beyond the complete record—generally requires the presence of an exception to the record rule, such as . . . a strong showing of bad faith or improper behavior." *Fort Sill*, 345 F. Supp. 3d at 9 (quotation omitted); *see infra* § III. "By contrast, on a motion to complete the record, a plaintiff must only

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[5] Agencies often include deliberative materials in the administrative record. *See, e.g., Epsilon Elecs., Inc. v. U.S. Dep't of the Treasury*, 857 F.3d 913, 928 (D.C. Cir. 2017); *Wyoming v. U.S. Dep't of Agric.*, 661 F.3d 1209, 1264-65 (10th Cir. 2011). If an agency wishes to withhold such material as privileged, it should do so expressly "to permit courts and other parties to test the merits of the privilege claim." *EEOC v. BDO USA, LLP*, 876 F.3d 690, 697 (5th Cir. 2017) (quotation and alteration omitted). After all, the "deliberative process privilege is a qualified privilege and can be overcome by a sufficient showing of need." *In re Sealed Case*, 121 F.3d 729, 737 (D.C. Cir. 1997); *Texaco P.R., Inc. v. Dep't of Consumer Affairs*, 60 F.3d 867, 885 (1st Cir. 1995); *see* Brief of Amici Curiae NRDC et al. at 5-6, 15-21, *In re United States*, 138 S. Ct. 443 (2017) (No. 17-801).

put forth concrete evidence and identify reasonable, non-speculative grounds for its belief that the documents were considered by the agency and not included in the record." *Fort Sill*, 345 F. Supp. 3d at 9 (quotation and alteration omitted).

Of course, a motion to complete the record requires "more than speculation." *NVE, Inc. v. Dep't of Health & Human Servs.*, 436 F.3d 182, 195 (3d Cir. 2006). It does not suffice for a plaintiff to "merely assert" that materials "were before an agency when it made its decision." *Marcum v. Salazar*, 751 F. Supp. 2d 74, 78 (D.D.C. 2010). However, "[i]f a plaintiff can show that a piece of evidence *was* before the agency at the time the decision was made—and thus that that evidence *is* part of the administrative record—it makes little sense to require that the plaintiff also show [bad faith or some other] unusual circumstances before requiring the agency to add the properly-part-of-the-record evidence to the record." *Oceana*, 290 F. Supp. 3d at 78. Completion of the administrative record is appropriate to ensure effective judicial review, even if the agency excluded documents by mistake. *Kent Cty., Del. Levy Ct. v. EPA*, 963 F.2d 391, 396 (D.C. Cir. 1992).

In other words, no special justification is necessary "to complete the current record to include materials that should have been there from the start." *Miami Nation of Indians of Indiana v. Babbitt*, 979 F. Supp. 771, 777 (N.D. Ind. 1996). "If an agency did not include materials that were part of its record, whether by design or accident," they should be included in the record for the court's review. *Styrene Info. & Research Ctr., Inc. v. Sebelius*, 851 F. Supp. 2d 57, 63 (D.D.C. 2012) (quotation omitted). "To hold otherwise would result in the Court reviewing agency

action without the entire administrative record before it, contrary to what the APA directs." *Oceana*, 290 F. Supp. 3d at 78. Any such "contrary approach" would contravene the court's duty to "ensure that agency decisions are founded on a reasoned evaluation," and would threaten to "render judicial review [under the APA] generally meaningless." *Marsh*, 490 U.S. at 378.

C. Defendants in this case concede that the initial administrative record they submitted to the district court in June 2018 was incomplete. That submission contained only 1,320 pages and included hardly any material pre-dating the December 2017 letter from the Department of Justice (DOJ) that requested addition of a citizenship question to the census. *See New York*, 351 F. Supp. 3d at 530-45 (describing contents of the initial submission). Secretary Ross purported to base his March 2018 decision to add a citizenship question on DOJ's request. Pet. App. 548a-563a.

Within two weeks of submitting that initial record, however, and just days before a hearing on its adequacy, Defendants sought to "supplement" the administrative record with an unusual, two-paragraph memorandum from Secretary Ross that sought to "provide further background and context" for his March 2018 decision. Dkt. No. 189. [6] The memorandum disclosed that Ross began considering whether to add a citizenship question "[s]oon after

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[6] As the district court observed, because the supplemental memorandum post-dates the challenged March 2018 decision by several months, "it was *Defendants* who first sought to introduce material 'outside' the Administrative Record into this case," which is "[i]ronic[], in light of Defendants' own subsequent (and ongoing) efforts to limit the evidence th[e] Court may consider." *New York*, 351 F. Supp. 3d at 547 n.18.

[his] appointment as Secretary of Commerce"—that is, almost a year in advance of the DOJ letter—and that *he and his staff* had asked DOJ to "request[] inclusion of a citizenship question." Pet. App. 546a. However, as noted above, the initial administrative record submitted by Defendants did not contain material reflecting such considerations or inter-agency proceedings. Instead, that demonstrably "incomplete record" provided only a "fictional account of the [agency's] actual decisionmaking process." *Portland Audubon Soc'y*, 984 F.2d at 1548.[7]

Plaintiffs then moved for two distinct forms of relief: "first, an order compelling Defendants to 'complete' the Administrative Record; and second, an order authorizing discovery 'outside' the Administrative Record." *New York*, 351 F. Supp. 3d at

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[7] Defendants later sought to justify the initial account of Secretary Ross's decisionmaking by differentiating between what they characterized as the "*informal*" process that predated the DOJ letter and the "*formal* agency process" that DOJ's letter purportedly triggered. Brief for Petitioner at 16, *In re Dep't of Commerce*, No. 18-557 (Dec. 17, 2018). But as the district court observed, this "purported distinction" has no basis in the law. *New York*, 351 F. Supp. 3d at 547. To be sure, the APA *does* differentiate between informal and formal agency proceedings, *compare* 5 U.S.C. § 553, *with id.* §§ 554, 556-57. But formal proceedings under the APA are subject to requirements—including a prohibition on ex parte communications, *id.* § 557(d)(1)(A); a right to call and cross-examine witnesses, *id.* § 556(d); and transcribed hearings, *id.* § 556(e)—that do not apply to informal proceedings, and that Defendants never followed here. Instead, Secretary Ross's *entire* decisionmaking process was indisputably an informal proceeding under the APA. And "[t]he APA specifically contemplates judicial review on the basis of the agency record compiled in the course of informal agency action." *Fla. Power & Light*, 470 U.S. at 744.

529. The district court granted both requests. Pet. App. 523a-531a. In response to the completion order, Defendants submitted an additional 12,000 pages into the record, *see* Dkt. No. 212, which largely reflected the newly disclosed decisionmaking process described in Secretary Ross's supplemental memorandum.

Importantly, while Defendants later challenged the district court's order authorizing extra-record discovery, *see In re Dep't of Commerce*, No. 18-557, they "never challenged its ruling with respect to completing the Administrative Record," *New York*, 351 F. Supp. 3d at 529. Instead, they later stipulated that virtually all 12,000 pages they submitted in response to the completion order are part of the administrative record and thus appropriate for judicial review. *Id.* at 518 n.4 (citing Dkt. Nos. 523, 524).

## III. Courts may allow parties to supplement the administrative record with extra-record evidence in limited circumstances.

As described above, judicial review of agency action under the APA is limited to the administrative record as a "general rule." *Lands Council v. Powell*, 395 F.3d 1019, 1029 (9th Cir. 2005). "Were the federal courts routinely or liberally to admit new evidence when reviewing agency decisions," they would risk proceeding without "proper deference to agency processes, expertise, and decision-making." *Id.* at 1030. And, at the same time, agencies cannot seek to justify their actions with "*post hoc* rationalizations." *Am. Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 539 (1981). Thus, "neither party is *entitled* to supplement th[e] record with litigation affidavits or other evidentiary material that was not before the

agency." *Edison Elec. Inst. v. OSHA*, 849 F.2d 611, 617-18 (D.C. Cir. 1988) (emphasis added).

This Court has acknowledged, however, that it "may be necessary" for a court to look beyond the record at times to determine whether an agency "acted within the scope of [its] authority" or its action is "justifiable under the applicable standard." *Overton Park*, 401 U.S. at 420. In other words, "certain circumstances may justify expanding review beyond the record or permitting discovery." *Animal Def. Council v. Hodel*, 840 F.2d 1432, 1436 (9th Cir. 1988), *amended by* 867 F.2d 1244 (9th Cir. 1989).

Courts therefore have recognized certain "narrow exceptions" to the record rule in which they are "permitted to admit extra-record evidence." *Lands Council*, 395 F.3d at 1030. "These limited exceptions operate to identify and plug holes in the administrative record." *Id.* They apply where "extra-record information is necessary to enable judicial review to become effective." *Styrene Info.*, 851 F. Supp. 2d at 63 (quotation and alteration omitted).

The exceptions invoked by the district court in this case are "widely accepted," even if "narrowly construed and applied," *Lands Council*, 395 F.3d at 1030. Specifically, supplemental extra-record evidence may be appropriate:

(A) Where "necessary to explain technical terms or complex subject matter," or "to determine whether the agency has considered all relevant factors"; and

(B) Where plaintiffs make a strong showing of agency bad faith or improper behavior.

*Id.* (quotation omitted); *see New York*, 351 F. Supp. 3d at 633-35. The district court in the parallel California case challenging Secretary Ross's census decision invoked these same exceptions as well. *See California v. Ross*, --- F. Supp. 3d ---, No. 18-cv-01865-RS, 2019 WL 1052434, at *31-32 (N.D. Cal. Mar. 6, 2019).

### A. Extra-record evidence may explain complex subject matter or identify factors not considered by the agency.

Courts of appeals have long held that a reviewing court evaluating agency action on the administrative record "may consider additional evidence as either background information to aid the court's understanding, or to determine if the agency examined all relevant factors or adequately explained its decision." *United States v. Akzo Coatings of Am., Inc.*, 949 F.2d 1409, 1428 (6th Cir. 1991); *see Arkla Expl. Co. v. Texas Oil & Gas Corp.*, 734 F.2d 347, 357 (8th Cir. 1984).[8] This type of evidence is most common in cases involving "highly technical matters." *Asarco, Inc. v. EPA*, 616 F.2d 1153, 1160 (9th Cir. 1980).

1. In such cases, it may be "impossible" for the reviewing court to "determine whether the agency took into consideration all relevant factors unless it looks outside the record to determine what matters the agency should have considered but did not." *Id.* Extra-record evidence may thus "help the court understand

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[8] This category of extra-record evidence is often identified as two distinct exceptions to the record rule. *See Lands Council*, 395 F.3d at 1030; *S. Utah Wilderness All. v. Thompson*, 811 F. Supp. 635, 643 n.4 (D. Utah 1993). This brief discusses them together, however, because—in this case, at least—they are "somewhat related." *New York*, 351 F. Supp. 3d at 633.

the complex" issues involved, and "educat[e] the court as to the kinds of scientific, technical, and economic data that are relevant" to the challenged agency decision. *Arkla Expl. Co.*, 734 F.2d at 357. "Without [such] supplementary evidence," the court might be unable to determine whether the agency "adequately considered all the factors that go into a [reasoned] determination." *Id.* "The court cannot adequately discharge its duty" under the APA "if it is required to take the agency's word that it considered all relevant matters." *Asarco*, 616 F.2d at 1160; *see Nat'l Audubon Soc'y v. Hoffman*, 132 F.3d 7, 15 (2d Cir. 1997) ("[t]he omission of technical scientific information is often not obvious from the record itself").[9]

Importantly, while extra-record evidence may be helpful to assist the court "in understanding the problem faced by the Agency and the methodology it used to resolve it," it should not be used as a "new rationalization" either for "sustaining or attacking the Agency's decision." *Ass'n of Pac. Fisheries v. EPA*, 615 F.2d 794, 811-12 (9th Cir. 1980) (Kennedy, J.). In other words, such evidence is admissible "to educate the court and to illuminate the administrative record, not to substitute the court's judgment for the [agency's]." *Arkla Expl. Co.*, 734 F.2d at 357; *see San Luis & Delta-Mendota Water Auth. v. Locke*, 776 F.3d 971, 993 (9th Cir. 2014).

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[9] Such supplemental evidence may be particularly appropriate in cases involving informal agency adjudication, where—unlike with formal adjudications or rulemakings—plaintiffs might have lacked an "opportunity to submit such evidence" into the administrative record. *Oceana, Inc. v. Pritzker*, 126 F. Supp. 3d 110, 113-14 (D.D.C. 2015).

2. In this case, the district court allowed the parties to present supplemental evidence on various technical matters, such as expert testimony on the Census Bureau's established testing protocols. *See New York*, 351 F. Supp. 3d at 560-61. Such extra-record evidence is relatively common in census-related litigation. *See, e.g.*, *Utah v. Evans*, 536 U.S. 452, 466-68 (2002) (noting district court considered expert testimony regarding Census Bureau's practice of "imputation"); *Cuomo v. Baldrige*, 674 F. Supp. 1089, 1093 (S.D.N.Y. 1987) (describing bench trial "consisting almost exclusively of expert testimony" by "experts in the fields of demographics and statistics"). As the district court in the parallel California case observed, because census-related litigation "involves complex technical issues related to survey methodology" and testing procedures, "meaningfully evaluating whether Defendants considered all relevant factors or irrationally departed from settled policy would be difficult on the Administrative Record alone." *California*, 2019 WL 1052434 at *32.

Defendants (very briefly) contest the district court's reliance on this extra-record evidence in its determination regarding one of three different relevant factors that it found Secretary Ross had failed to consider, *see* U.S. Br. 38—namely, whether the Census Bureau's statutory confidentiality obligations would affect the ability of a citizenship question to help enforce voting rights. *See New York*, 351 F. Supp. 3d at 653-54; *see also California*, 2019 WL 1052434 at *66. However, in suggesting that the district court's reliance on this evidence was "improper," U.S. Br. 38, Defendants merely cross reference their arguments about the court's application of the *other* exception to the record rule—i.e., extra-record discovery to probe

the decisionmaker's mental processes based on a showing of bad faith. *Id.* (citing U.S. Br. 55-56). Defendants thus never explain why the district court could not rely on this extra-record evidence as "background information" necessary to "determine whether the agency considered all of the relevant factors." *Animal Legal Def. Fund, Inc. v. Perdue*, 872 F.3d 602, 620 (D.C. Cir. 2017) (quotation omitted); *see New York*, 351 F. Supp. 3d at 653 n.72 (citing *Asarco*, 616 F.2d at 1160); *id.* at 635 (citing *Ass'n of Pac. Fisheries*, 615 F.2d at 811-12).

### B. Where plaintiffs make a strong showing of bad faith or improper behavior, extra-record discovery may help ensure review of agencies' actual decisionmaking.

Supplemental evidence outside the administrative record—including, specifically, "inquiry into the mental processes of administrative decisionmakers"—is also appropriate where plaintiffs make a "strong showing of bad faith or improper behavior." *Overton Park*, 401 U.S. at 420. In other words, although judicial review is ordinarily "confined to the evidence contained in the administrative record," a showing of agency bad faith or improper behavior "justifies inquiry beyond the record compiled." *United States v. Shaffer Equip. Co.*, 11 F.3d 450, 460 (4th Cir. 1993); *see Latecoere Int'l, Inc. v. U.S. Dep't of Navy*, 19 F.3d 1342, 1357 (11th Cir. 1994).

1. The bad faith exception, like other exceptions to the record rule, exists because extra-record evidence is sometimes "necessary to a meaningful judicial review of the agency's action." *Tummino v. Hamburg*, 936 F. Supp. 2d 162, 196 (E.D.N.Y. 2013). For example, an agency decisionmaker's "subjective bad

faith"—such as "predetermining" a decision or "harboring a prejudice" against certain parties—may "constitute[] arbitrary and capricious action." *Latecoere*, 19 F.3d at 1356; *see James Madison Ltd. by Hecht v. Ludwig*, 82 F.3d 1085, 1096 (D.C. Cir. 1996). Agency action may also be unlawful if infected by improper political influence, *Tummino v. Torti*, 603 F. Supp. 2d 519, 544-46 (E.D.N.Y. 2009); *see Aera Energy LLC v. Salazar*, 642 F.3d 212, 221 (D.C. Cir. 2011), or (at least in formal proceedings) by secret, ex parte communications, *Home Box Office, Inc.*, 567 F.2d at 51-58; *Portland Audubon Soc'y v*, 984 F.2d at 1539-42.

Evidence of these legal infirmities, however, is "unlikely to ever appear within the four corners of the official administrative record." *Earth Island*, 256 F. Supp. 2d at 1078 n.16; *see Beta Analytics Int'l, Inc. v. United States*, 61 Fed. Cl. 223, 226 (2004). Government officials will "seldom, if ever, announce on the record that they are pursuing a particular course of action because of their desire to discriminate." *Smith v. Town of Clarkton*, 682 F.2d 1055, 1064 (4th Cir. 1982). And "agency officials are not likely to keep a written record of improper political contacts." *Sokaogon Chippewa Cmty. v. Babbitt*, 961 F. Supp. 1276, 1281 (W.D. Wis. 1997). Thus, in a case where bad faith or improper behavior is at issue, "the court's responsibility to reach a just resolution" may require that it have "all relevant evidence before it," *id.* at 1280—including, at times, testimony from agency decisionmakers. *See Latecoere*, 19 F.3d at 1364-65 (relying on agency officials' testimony to find impermissible bias).

Moreover, because this evidence is, by its nature, generally in the exclusive possession of agency

defendants, discovery beyond the administrative record may be necessary to ensure effective judicial review. The "only way to uncover [improper] contacts," for example, may be "by examining relevant phone records and by asking these officials about their discussions." *Sokaogon*, 961 F. Supp. at 1281. In appropriate circumstances, then, courts may authorize limited extra-record discovery of agency officials. Without this ability, courts would be unable to carry out their "important" role in "ensuring that agencies have engaged in reasoned decisionmaking." *Judulang*, 565 U.S. at 53.

2. Such discovery is—and should be—rare. It is not permitted as a matter of course. "[A]llowing depositions and extra-record discovery will impose a burden on the agency officials." *Sokaogon*, 961 F. Supp. at 1280. "If courts are too lenient" in permitting such discovery, "agency officials might spend much of their time defending themselves in court against allegations brought by parties disappointed with an agency's decision." *Id.* Thus, "strong preliminary showings of bad faith" are required "before the taking of testimony" regarding "internal agency deliberations." *Nat'l Nutritional Foods Ass'n v. FDA*, 491 F.2d 1141, 1145 (2d Cir. 1974) (Friendly, J.). Extra-record discovery cannot be based on only an "unsubstantiated allegation" of bad faith. *City of Mount Clemens v. EPA*, 917 F.2d 908, 918 (6th Cir. 1990); *see Bark v. Northrop*, 2 F. Supp. 3d 1147, 1153 (D. Or. 2014).

At the same time, it cannot be necessary to definitively *prove* bad faith in order to justify discovery. Although a court may require "significant evidence of wrongdoing before allowing [plaintiffs] to

conduct extra-record discovery, it cannot require them to come forward with conclusive evidence" of improper behavior "at a point when they are seeking to discover the extent of those improprieties." *Sokaogon*, 961 F. Supp. at 1281; *see New York v. Salazar*, 701 F. Supp. 2d 224, 243 (N.D.N.Y. 2010). In other words, a party cannot be expected to produce the *outcome* of a deposition to justify deposing an agency official in the first place. *Cf. Simmons v. Smith*, 888 F.3d 994, 1001-02 & n.7 (8th Cir. 2018) (considering agency official's deposition testimony in determining that plaintiff ultimately failed to prove bad faith).

To balance these competing interests, courts recognize that limited extra-record discovery may be appropriate when the plaintiff makes a "significant showing—variously described as a strong, substantial, or prima facie showing—that it will find material in the agency's possession indicative of bad faith or an incomplete record." *Air Transp. Ass'n of Am., Inc. v. Nat'l Mediation Bd.*, 663 F.3d 476, 487 (D.C. Cir. 2011) (quotation omitted). Courts have found this standard satisfied where plaintiffs introduced "sufficient evidence of improper [behavior] as to raise suspicions that defy easy explanations," *Sokaogon*, 961 F. Supp. at 1281, or where the evidence "suggests, at least preliminarily, that the [agency's] actions were predetermined and influenced by factors not relevant to its consideration," *Salazar*, 701 F. Supp. 2d at 243. In other words, where indications of bad faith or improper behavior suggest that the administrative record does not accurately reflect the agency's decisionmaking process, the court may need to look

beyond that record to determine whether the agency action is lawful.[10]

3. The district court faithfully applied the bad faith exception in this case when it authorized limited extra-record discovery of Defendants' decisionmaking process. It found that Plaintiffs made the requisite "strong showing" of bad faith or improper behavior based on Secretary Ross's incomplete, shifting, and "potentially untrue" accounts of his decisionmaking; significant irregularities in the agency proceedings; and prima facie evidence that Secretary Ross prejudged the decision and that the stated grounds for his decision were pretextual. Pet. App. 524a-528a.

These circumstances fall well within the contours of bad faith and improper behavior. *See* Black's Law Dictionary (10th ed. 2014) ("Bad faith" means "dishonesty of belief, purpose, or motive"; "[i]mproper" means "unsuitable or irregular."). They are also of a piece with other cases where courts have permitted extra-record discovery based on misleading agency accounts or irregular proceedings. *See, e.g., Mar. Mgmt., Inc. v. United States*, 242 F.3d 1326, 1330, 1333-35 (11th Cir. 2001) (affirming finding of bad faith and discovery where agency "purposefully withheld negative documents" from administrative record); *Stand Up for California! v. U.S. Dep't of Interior*, 315

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[10] *See also Sierra Club v. Costle*, 657 F.2d 298, 390 n.450 (D.C. Cir. 1981) (suggesting the "requisite showing of bad faith" would be satisfied by evidence that raises "serious doubts" about the "integrity" of the agency proceeding); *cf. Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 174 (2004) (Freedom of Information Act requester may rebut presumption of regularity with "evidence that would warrant a belief by a reasonable person that the alleged Government impropriety might have occurred").

F. Supp. 3d 289, 296 (D.D.C. 2018) (allowing discovery based on evidence of a "clearly hurried review process" and "political pressure"); *Tummino*, 603 F. Supp. 2d at 544 (allowing discovery based on "unusual involvement" of upper management, evidence of "improper" motivations, and other "procedural irregularities"). As in these other cases, the district court here reasonably determined that, in light of Defendants' shifting accounts and other procedural irregularities, the "chain of events leading up to" Secretary Ross's decision "cannot be fully understood" without the "deposition testimony of key [agency] decision-makers and other materials illuminating these decision-making processes." *Tummino*, 603 F. Supp. 2d at 544.[11]

4. Defendants contest this extra-record discovery, U.S. Br. 55, but their argument conflates the standards for ultimately *proving* unlawful agency action with that for justifying *discovery* or *consideration* of extra-record evidence in the first place. Defendants contend that the district court "erred in allowing and considering extra-record discovery" because, in their view, the Secretary's decision "was neither pretextual nor arbitrary and capricious," and thus "it was not made in bad faith." *Id.* But whether Plaintiffs ultimately succeeded in proving bad faith is a different question from whether they made a sufficiently "strong showing" to justify supplementing the administrative record at all. *Overton Park*, 401 U.S. at 420. While a plaintiff may

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[11] The district court in this case also carefully limited the scope of discovery, Pet. App. 529a-530a, and policed those limits by denying many of plaintiffs' specific discovery requests, *New York*, 351 F. Supp. 3d at 548 n.19.

need "clear and convincing evidence of bad faith or bias to prevail on the merits," a "lesser showing suffices" to "warrant supplementation of the administrative record." *L-3 Commc'ns Integrated Sys., L.P. v. United States*, 91 Fed. Cl. 347, 355 (2010).

Defendants' own argument highlights the reason for this distinction. They acknowledge elsewhere that an agency action must be set aside, irrespective of the soundness of its asserted rationale, if the decisionmaker (1) "did not believe the stated grounds"; (2) "irreversibly prejudged the decision"; or (3) "acted on a legally forbidden basis." U.S. Br. 42. Defendants then contend that it does not matter whether Secretary Ross's voting-rights rationale was pretextual—or whether he in fact had "additional reasons" for adding a citizenship question—because none of the three circumstances listed above appear in the administrative record. *Id.* at 43-45. But as noted above, these unlawful circumstances are precisely the types of things that, where they exist, will not appear in an administrative record. "[R]are indeed would be the occasions when evidence of bad faith will be placed in an administrative record, and to insist on this—and thus restrict discovery regarding bad faith to cases involving officials who are both sinister *and* stupid—makes little sense." *Beta Analytics*, 61 Fed. Cl. at 226.

Discovery must therefore be available, in certain circumstances, so that a reviewing court ultimately *can* determine whether—in Defendants' words—an agency decisionmaker's unstated "additional reasons" were "legally forbidden." U.S. Br. 41-42. This is particularly true where, as here, available evidence suggests that the agency sought to conceal important aspects of its decisionmaking process, including the

actual reasons for the challenged decision. *Cf. In re Subpoena Duces Tecum Served on Office of Comptroller of Currency*, 156 F.3d 1279, 1279-80 (D.C. Cir. 1998) (acknowledging that the "actual subjective motivation of agency decisionmakers" is relevant where "there is a showing of bad faith or improper behavior").[12]

Defendants appear to fault the district court because it never identified Secretary Ross's "real reason" for adding a citizenship question. U.S. Br. 41. But as the district court observed, the "actual reasons" for Secretary Ross's decision remain a mystery. *New York*, 351 F. Supp. 3d at 569. "[N]o writing of any kind" describes the "reasons why [he] wanted to add a

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[12] The district court catalogued a "number of ways in which Secretary Ross and his aides tried to avoid disclosure of, if not conceal, the real timing and the real reasons for the decision to add the citizenship question." *New York*, 351 F. Supp. 3d at 571. These include, among other things, the "curated and highly sanitized nature" of the initial administrative record submitted by Defendants in this case. *Id.* at 571-72. "Defendants now concede that the Administrative Record consists of over 13,000 pages of documents, even though their initial submission contained only 1,320 pages." *California*, 2019 WL 1052434 at *48. This order-of-magnitude omission cannot be ascribed to mere oversight, especially given correspondence between Secretary Ross and his chief of staff (and disclosed only in response to the district court's completion order) about a need to be "diligent in preparing the administrative record," "[s]ince this issue will go to the Supreme Court." *New York*, 351 F. Supp. 3d at 553 (quoting AR12476). Also missing from the initial record was evidence, disclosed later, that senior Department of Commerce officials altered the Census Bureau's written answers to their questions in an effort to downplay the extent to which Secretary Ross's decision deviated from the agency's "well-established process" for changing the census. *Id.* at 562-64 (quoting AR2303); *see California*, 2019 WL 1052434 at *42-43, *53.

citizenship question within weeks of his confirmation as Secretary," *id.*—that is, long before DOJ supplied the asserted voting-rights rationale. Moreover, his top aides "all claim, rather implausibly, to be ignorant of why Secretary Ross wanted the citizenship question." *California*, 2019 WL 1052434 at *65. "This suggests either that, despite several months of discussion, Secretary Ross kept his senior staff in the dark about his reason for wanting to include the citizenship question[,] or that his staff are dissembling in order to avoid revealing Secretary Ross's true purpose." *Id.* Either way, it was reasonable for the district court to "infer from the various ways in which Secretary Ross and his aides acted like people with something to hide that they *did* have something to hide." *New York*, 351 F. Supp. 3d at 662; *cf. Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 147 (2000) (trier of fact "can reasonably infer" from dishonesty that defendants are "dissembling to cover up" an ulterior purpose).

These omissions from the administrative record, as well as the aides' asserted ignorance about Secretary Ross's actual reasons for wanting to add a citizenship question to the census, are why the district court found that "exceptional circumstances" warranted a limited, four-hour deposition of Secretary Ross himself. Pet App. 437a-451a. Secretary Ross undoubtedly had "unique first-hand knowledge related to the litigated claims," and "the necessary information [could not] be obtained through other, less burdensome" means. *Lederman v. N.Y. City Dep't of Parks & Recreation*, 731 F.3d 199, 203 (2d Cir. 2013). Defendants, of course, fought that deposition and secured a stay from this Court. *In re Dep't of Commerce*, 139 S. Ct. 16 (2018). But having done so, they cannot now reasonably contend that *other* extra-

record discovery was improper simply because Plaintiffs could not prove—without the deposition—that Secretary Ross's "real reason" for adding the citizenship question was unlawful. U.S. Br. 41.[13]

As the district court explained, although it ultimately was "unable to determine—based on the existing record, at least—what Secretary Ross's real reasons for adding the citizenship question were," it could (and did) "find, by a preponderance of the evidence, that promoting enforcement of [voting rights] was *not* his real reason for the decision." *New York*, 351 F. Supp. 3d at 569. Thus, Plaintiffs made a sufficiently "strong showing" of agency bad faith or improper behavior to justify the court's consideration of evidence outside the administrative record. And, as the court observed, it is "possible that Plaintiffs could have" proved that Secretary Ross acted on a legally forbidden basis "had they had access to sworn testimony from Secretary Ross himself." *Id.* at 671.

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[13] The district court in the California case observed that "there is some evidence in the Administrative Record that Secretary Ross's interest in the citizenship question was related to the inclusion of noncitizens in the apportionment count." *California*, 2019 WL 1052434 at *62; *see id.* at *47 (noting that "Secretary Ross was urged to include the citizenship question by [Kansas Secretary of State Kris] Kobach, among others, to facilitate the exclusion of noncitizens from the population count for congressional apportionment"). *But cf. Evenwel v. Abbott*, 136 S. Ct. 1120, 1128-29 (2016) (noting constitutional requirement that all inhabitants be counted for congressional apportionment).

## CONCLUSION

The district court's judgment should be affirmed.

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Respectfully submitted,

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